MALAYAN THREAD CO. SDN. BHD.

v.

KASUME SUPERMARKET SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[COMPANIES WINDING-UP NO. 42-102 OF 86]
23 DECEMBER 1991

COMPANY LAW: *Winding-up petition against respondent - Application to set aside or stay proceedings by applicant - Respondent's registered office, business and assets at Miri, Sarawak - Petitioner's registered office and business in the State of Malaya - Winding-up petition filed at High Court Johor Bahru - Writ of distress obtained from High Court in Borneo at Miri, against respondent by applicant - High Court, Johor Bahru ordered respondent to be wound up in their absence, whether High Court in Malaya has jurisdiction under Federal Constitution to make any order of winding-up - Respondent - Company is resident with all its assets in Borneo States of Sabah and Sarawak.*

This was an application by way of notice of motion on the part of the applicant for the winding-up petition dated 24 September 1986 against the respondent and all proceedings in relations to the winding-up to be set aside or stayed.

Held:

[1] Having regard to the essential facts in the present case as aforesaid, the cause of action or factual situation on which the proceedings were based arose or occurred "within the local jurisdiction" of the High Court in Borneo, the Court is compelled to find that the High Court in Borneo is in law the only competent forum to entertain the said petition quite apart from it being so obviously the forum conveniens.

[2] Accordingly, the High Court in Malaya (at Johor Bahru) lacked jurisdiction when it entertained the said petition and made the winding-up order on 2 December 1986. The order was therefore null and void and it is set aside with costs to the applicant.

[Winding-up order set aside. Costs to applicant.]

Cases referred to:

Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd. [1975] 2 MLJ 115 ***(cons)***

Distillers Co. (Biochemicals) Ltd. v. Laura Anne Thompson [1971] AC 458 ***(foll)***

Legislation referred to:

Common Law Procedure Act [UK], s. 18(4)
Companies (Winding-up) Rules 1972, r. 32(1)(a), (b) (d), (e)
Courts of Judicature Act 1964, ss. 23, 24(c)
Rules of the Supreme Court 1957 O. 48A r. 1

For the applicant - D.J. Puthucheary; M/s. Skrine & Co.
For the petitioner - B.C. Ong; M/s. Ong Ban Chai & Co.

JUDGMENT

LC Vohrah J:

This is an application by way of notice of motion on the part of Electra House Sdn. Bhd. ("Electra"), for the winding-up petition herein dated 24 September 1986 ("the said petition") and all proceedings in relation to the winding-up to be set aside or stayed.

The facts in so far as they are relevant to this application are as follows. Kasume Supermarket Sdn. Bhd. ("Kasume"), was at the material time a company having its registered office, business and assets in Miri, Sarawak whilst Electra was the developer of a shopping and office complex known as and situated at Wisma Pelita Tunku, Puchong Road, Miri, Sarawak. Kasume was then the owner of the emporium unit on the second floor and the sub-lessee of the emporium units on the ground, first and third floors of Wisma Pelita Tunku. By the said petition filed on 27 September 1986 the Malayan Thread Co. Sdn. Bhd. ("Malayan Thread"), having its registered office and business in the States of Malaya petitioned the High Court in Malaya at Johor Bahru for the winding-up of Kasume and for related orders under the provisions of the Companies Act 1965. In the said petition Malayan Thread stated, as the ground for the prayers sought therein, that Kasume was unable to pay its debt to Malayan Thread in the sum of RM28,627.58 being the balance of the purchase price of goods sold and delivered to Kasume. The said petition was supported by 13 creditors all having their registered offices and businesses in the States of Malaya. On 13 October 1986 pursuant to five writs of seizure and sale obtained by four separate execution creditors from the High Court in Borneo at Miri, the goods of Kasume at Wisma Pelita Tunku were seized by the Sheriff of the High Court in Borneo at Miri. On 15 October 1986 Electra obtained from the High Court in Borneo at Miri a writ of distress directing the sheriff to distrain the movable property to be found at the premises at Wisma Pelita Tunku for RM701,121.22 being the amount of arrears of rent for nine months and twelve days due to Electra from 19 January 1986 to 31 October 1986. On 17 October 1986 the High Court in Borneo at Miri ordered that the proceeds obtained by the sheriff on the sale of the said goods of Kasume on 13 October pursuant to the said writs of seizure and sale be deposited in Court and not be paid out until further order of the Court. On 2 December 1986 after due certification by the Registrar that the requirements of r. 32(1)(a), (b), (d) and (e) of the Companies (Winding-Up) Rules 1972 had been complied with the High Court in Malaya at Johor Bahru heard the said petition in the absence of Kasume and granted an order in terms thereof and ordered Kasume to be wound up. On 18 December 1986 the sheriff of the High Court in Borneo at Miri received a letter dated 9 December 1986 from Messrs. Ong Ban Chai & Co. of Johor Bahru, solicitors acting on behalf of Malayan Thread, requesting him pursuant to the winding-up order to auction the goods seized by him and to make a report to the liquidator at Johor Bahru.

On the part of Electra, it has been contended by Datuk Dominic Puthucheary that the winding-up order made by the High Court in Malaya at Johor Bahru in respect of Kasume is bad in law because the High Court in Malaya has no jurisdiction by virtue of the provisions of Article 121 of the Federal Constitution to make any order winding up a company which is resident with all its assets in the Borneo States of Sabah and Sarawak. Datuk Puthucheary's contention is based squarely on a provision in the Federal Constitution.

On the part of Malayan Thread, it has been contended by Mr. Ong Ban Chai in essence that by virtue of the provisions of ss. 23 and 24(c) of the Courts of Judicature Act 1964 the High Court in Malaya at Johor Bahru had the jurisdiction to hear the said petition although the registered office of Kasume and all its assets are situated in Sarawak. Mr. Ong's contention is based on provisions in a statute.

The basic question that arises from the opposing contentions is whether the High Court in Malaya at Johor Bahru is precluded by the Federal Constitution from assuming jurisdiction over the said petition having regard to the fact that Kasume is resident with all its assets in Sarawak within the territorial jurisdiction of the High Court in Borneo. To answer that question it would be appropriate to begin with a consideration of the constitutional provisions relating to the division of judicial power in the Federation and the interaction of these constitutional

provisions with the relevant statutory provisions in the Courts of Judicature Act relating to the defined powers of the Superior Courts of Judicature of Malaysia. The relevant constitutional provisions are contained in Article 121 of the Federal Constitution and they read:

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(3) Subject to any limitations imposed by or under federal law, any order, decree, judgment or process of the Courts referred to in Clause (1) or of any Judge thereof shall (so far as its nature permits) have full force and effect according to its tenor throughout the Federation, and may be executed or enforced in any part of the Federation accordingly; and federal law may provide for Courts in one part of the Federation or their officers to act in aid of Courts in another Article

The relevant provisions of ss. 23 and 24 of the Courts of Judicature Act are set out as follows:

23(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:

(a) the cause of action arose, or

(b) the defendant or one of several defendants resides or has his place of business, or

(c) the facts on which the proceedings are based exist or are alleged to have occurred, or

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

(2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

24. Without prejudice to the generality of s. 23 the civil jurisdiction of the High Court shall include:

(a)
(b)
(c) jurisdiction under any written law relating to bankruptcy or to companies;
(d)
(e)
(f)

The effect of Article 121 on the provisions of the Courts of Judicature Act with regard to the jurisdiction and powers of the respective High Courts in Malaya and in Borneo was discussed in some detail in *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd.* [1975] 2 MLJ 115 where the Court had to consider the application of O. 48A r. 1 of the Rules of the Supreme Court, the predecessor of the Rules of the High Court 1980, the relevant provisions of which order read:

> Any two or more persons claiming or being liable as co-partners and carrying on business **within the jurisdiction** may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; ... (Emphasis added)

The plaintiff in that case was a firm of contractors having its place of business in Tawau, Sabah, and the defendants an insurance company having its registered office in Kuala Lumpur. The question that arose was whether the plaintiff could sue in the High Court in Malaya and it was held, *inter alia*, that the High Court in Malaya and the High Court in Borneo have separate and distinct territorial jurisdictions. Hashim Yeop A. Sani J (as he then was) had this to say:

> After Malaysia Day, a peculiar set up was established in respect of the judicial powers of the Federation. Article 121 of the Federal Constitution and the Courts of Judicature Act 1964 set out the jurisdiction of the High Courts. The question is what is meant by "jurisdiction" in the context of the Constitution and the Courts of Judicature Act 1964? Counsel for the plaintiffs seeks to rely on the purported interplay of the definitions of "High Court" and "local jurisdiction" and s. 7(2) of the 1964 Act. Section 3 of the Courts of Judicature Act 1964 defines "High Court" to mean "the High Court in Malaya and the High Court in Borneo or either of them, as the case may require." The definition of "local jurisdiction" sets out the territorial jurisdiction of the High Court in Malaya and the High Court in Borneo. Section 7(2) of that Act provides that all writs, summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of the Court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia.
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> According to Counsel for the plaintiffs a distinction must be drawn between the meaning of "jurisdiction" and "local jurisdiction" in the 1964 Act. If I get him right, I think what he means is simply this: that where the word "jurisdiction" is used it means the whole of the jurisdiction of both the High Court in Malaya and High Court in Borneo, that is to say the whole of Malaysia, purporting to rely on the definitions of "High Court" and "local jurisdiction" in s. 3 of the Courts of Judicature Act 1964. But in my view that would be unduly stretching the meaning of "jurisdiction" in O. 48A r. 1 of the Rules of the Supreme Court 1957. There is no doubt at all that what O. 48A r. 1 speaks about is territorial jurisdiction and **it is all too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdiction. Article 121(1) of the Constitution speaks of the two High Courts having "co-ordinate jurisdiction" and the definition of "local jurisdiction" in the Courts of Judicature Act 1964 speaks of the territorial jurisdiction of each of the two High Courts**. Section 7(2) of the 1964 Act should not be misconstrued for what that subsection does is simply to get around the provision of O. 11 r. 1 of the Rules of the Supreme Court 1957 for convenience for otherwise unnecessary difficulties will arise in the process of the Courts within Malaysia. **The enactment of s. 7(2) of the 1964 Act itself would strengthen the argument that the framers of the 1964 Act recognised the distinctive territorial jurisdiction of the two High Courts in Malaysia**. (Emphasis added)

With respect, I agree with the views expressed above to the effect that Article 121(l) establishes the respective territorial jurisdictions of the High Court in Malaya and the High Court in Borneo and the necessary implication is that the provisions of the Courts of Judicature Act relating to the powers of the High Court must refer to the exercise of those powers within the territorial domain of each of these two Courts. That said, how does the High Court in each territory decide how to exercise its judicial power within its territorial domain? Or to put it in another way, how does it decide whether it has jurisdiction to entertain a particular action within its territory? To answer this question I would like to make reference

to *Distillers Co. (Biochemicals) Ltd. v. Laura Anne Thompson* [1971] AC 458, where the criteria to be employed to ascertain jurisdiction have been examined at some length by Lord Pearson. In that case an English company manufactured and sold in England to an Australian company a preparation known as Distaval, the principal ingredient of which was thalidomide obtained in bulk from German manufacturers. The English company neither warned the Australian company, nor on the printed matter supplied with the drug warned a possible purchaser, of the harmful effect on a foetus if the drug were taken by a pregnant woman. The plaintiff's mother, while pregnant, purchased the drug in New South Wales. The plaintiff was born with defective eyesight and without arms. The plaintiff proceeded against the English company in the Supreme Court of New South Wales. The English company filed a conditional appearance and applied for the writ to be set aside on the ground that the Court had no jurisdiction under s. 18(4) of the Common Law Procedure Act (No. 21 of 1989) which reads:

> If the defendant does not appear to the writ of summons within the time prescribed, a Judge, upon being satisfied: (a) that there is a cause of action which arose within the jurisdiction ... may, ... permit the plaintiff to proceed to sign final or interlocutory judgment ...

The application was dismissed by the Supreme Court and that decision was upheld by the Court of Appeal. On appeal to the Judicial Committee, it was held, dismissing the appeal, that "cause of action" in s. 18(4) of the Common Law Procedure Act meant "the act on the part of the defendant which gave the plaintiff cause of complaint" and, since the English company's failure to warn the plaintiff's mother of the dangers of taking the drug occurred when she purchased the drug in New South Wales, the plaintiff's cause of action arose within the jurisdiction. Lord Pearson's illuminating exposition of the principles to be employed in reaching a decision as to appropriate jurisdiction appears from pp. 466 to 468 as follows:

> Next to be considered is the question of principle - what is required in order to show, for the purpose of s. 18(4)(a) of the Act of 1899, "that there is a cause of action which arose within the jurisdiction." There seem to be three possible theories: (i) that the "cause of action" must be the whole cause of action, so that every part of it, every ingredient of it, must have occurred within the jurisdiction; (ii) that it is necessary and sufficient that the last ingredient of the cause of action, the event which completes a cause of action and brings it into being, has occurred within the jurisdiction; and (iii) that the act on the part of the defendant which gives the plaintiff his cause of complaint must have occurred within the jurisdiction.
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> But in *Jackson v Spittall* [1870] LR 5 CP 542 Brett J, **giving the judgment of the Court of Common Pleas ... referred to the growing needs of a commercial community**, and construed ss. 18 and 19 of that Act. *The conclusion was that the phrase cause of action" in these sections did not mean the whole cause of action but meant "the act on the part of the defendant which gives the plaintiff his cause of complaint."*
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> [T]he decision in *Jackson v Spittall* must be regarded as highly authoritative, and in any case the reasoning of Brett J is convincing ...
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> That rules out no. (i) of the three possible theories set out above - the theory that "cause of action" means the whole cause of action and the Courts of a country do not have jurisdiction unless all the ingredients of the cause of action occurred within the country (unless the defendant happens to be present in the country) ...
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> No. (ii) of the three possible theories - *viz.*, that it is necessary and sufficient that the last ingredient of the cause of action, the event which completes it and brings it into being, has occurred within the jurisdiction - seems to their Lordship to be wrong as a theory. The last event might happen in a particular case to be the determining factor on its own merits, by reason of its inherent importance, but not because it is the last event ...

But when the question is which country's Courts should have jurisdiction to try the action, the approach should be different: the search is for the most appropriate Court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor. In *Tyne Improvement Commissioners v. Armament Anversois S/A (The Brabo)* [1949] AC 326, Lord Porter said, at p. 338: **"***Primarily the jurisdiction of the Courts in this country is territorial in the sense that the contract or tort sued upon must have some connection with this country or the defendant must be served here.***"** In the case in Victoria, *Lewis Construction Co. Pty. Ltd. v. M. Tichauer S/A* [1966] VR 341, *the Court's decision was "that the questions to be litigated in this action are much more closely concerned with Victoria than with France and that the action is one which properly belongs to the Courts of this State."*

It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong.

The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise? Theory no. (iii) is that the cause of action arose within the jurisdiction if the act on the part of the defendant, which gives the plaintiff his cause of complaint has occurred within the jurisdiction. That is the rule laid down in *Jackson v. Spittall* [1870] LR 5 CP 542, which is an authoritative case, **and the rule is inherently reasonable, as the defendant is called upon to answer for his wrong in the Courts of the country where he did the wrong**. The rule does not, however, provide a simple answer for all cases. In *Jackson v. Spittall* [1870] LR 5 CP 542, the wrongdoing was a breach of contract and there was no difficulty in determining where it occurred." (emphasis added).

These principles based on commonsense in the light of territorial imperatives have (apparently through informed insight of the framers of the Courts of Judicature Act) been reflected in the relevant provisions of s. 23(1) defining the circumstances under which the High Court in each territory can assume jurisdiction over a civil matter. It appears to me therefore that unless the parties consent in writing the High Court of each territory can only assume jurisdiction over a matter if it arises in its territory or when the defendant or one of several defendants resides or has his place of business in its territory or when the factual situation is in its territory or when the land whose ownership is disputed is in its territory. As to jurisdiction relating to companies s. 24(c) applies only without prejudice to the provisions of s. 23 and cannot be interpreted to widen the territorial jurisdiction of or confer additional judicial power on each of the two High Courts. Having regard to the essential facts in the present case - that the said petition came to be initiated because of the failure on the part of Kasume in Miri to pay the balance of the purchase price of the goods sold and delivered to it, that Kasume is resident in Miri, that its assets are in Miri and that the liquidating of its assets would most conveniently be effected in Miri (because the Official Receiver's representative who will be responsible in managing Kasume's affairs upon the receiving and adjudicating orders being made has an office in Miri), I am of the considered view that the cause of action or the factual situation on which the proceedings are based arose or occurred "within the local jurisdiction" of the High Court in Borneo and I am, accordingly, compelled to find that the High Court in Borneo is in law the only competent forum to entertain the said petition quite apart from it being so obviously the forum conveniens. I accordingly hold that the High Court in Malaya (at Johor Bahru) lacked jurisdiction when it entertained the said petition and made the winding-up order it did on 2 December 1986. The order is therefore null and void and I hereby set it aside. Costs to Electra.

Also found at [1992] 1 CLJ 715